Embarq Corporation, a wholly-owned subsidiary of Centurytel, Inc., d/b/a Centurylink *and* International Brotherhood of Electrical Workers Local Union #396. Cases 28–CA–022804, 28–CA–022849, and 28–CA–023021

September 14, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND BLOCK

The central issue in this case is whether the Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union over its decision to eliminate a work classification and consequently discharge nine retail cashiers.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3] The material facts are fully set out in the judge's decision.

A. The Respondent's Duty to Bargain over its Decision

We agree with the judge that the Respondent's refusal to bargain over the decision to eliminate the retail cashier classification and discharge the cashiers was unlawful.

Absent contractual authority or other waiver by the union, where an employer discharges unit employees and transfers their work to other unit employees in order to reduce labor costs, and the work remains essentially the same, the action is a mandatory subject of bargaining. *Holmes & Narver/Morrison-Knudsen*, 309 NLRB 146, 147–148 (1992). Further, an employer cannot unilaterally eliminate a work classification that is established in a collective-bargaining agreement. *Wackenhut Corp.*, 345 NLRB 850, 852 (2005); *Mt. Sinai Hospital*, 331 NLRB 895, 895 fn. 2 (2000), enfd. 8 Fed.Appx. 111 (2d Cir. 2001); *Holy Cross Hospital*, 319 NLRB 1361, 1361 fn. 2 (1995).

The Respondent had a duty to bargain over its decision in this case, notwithstanding that the management-rights clause in the parties' collective-bargaining agreement gave the Respondent the right to "classify," "reassign," "lay off," and "discharge" employees. As the judge correctly found, this clause did not authorize the Respondent to unilaterally eliminate an entire work classification and discharge all the employees within it. In the cases cited by the Respondent, the contractual provisions that were held to privilege unilateral actions contained significantly broader or more explicit language than the clause at issue here.[4]

Nor, as the judge found, did the agreement's layoff provision privilege the Respondent's unilateral action. The Respondent, by its own admission, did not even consider the employees' seniority, as the layoffs article would have required if it were applicable. In addition, the Respondent had earlier made—and the Union had rejected—a proposal for a modification of the layoff article that would at least arguably have authorized the Respondent's action.[5]

Finally, the Union did not waive its right to bargain over the decision by any of its actions.[6] On August 26,

[1] On August 24, 2010, Administrative Law Judge George Carson II issued the attached decision. The Respondent, Embarq Corporation, a wholly owned subsidiary of Centurytel, Inc., d/b/a Centurylink, filed exceptions and the General Counsel filed cross-exceptions, and each filed supporting, answering, and reply briefs.

[2] The Respondent has excepted to the judge's findings that it unlawfully withheld information requested by the Union, but neither specifies the nature of its exceptions nor addresses them in its briefs. We therefore deny these exceptions under Sec. 102.46(b) of the Board's Rules, which requires an excepting party to "concisely state the ground of [each] exception." To satisfy this requirement, the party must do more than cite the findings excepted to. E.g., *Metropolitan Transportation Services*, 351 NLRB 657, 657 fn. 5 (2007). Even absent this procedural failure, however, we would reject this exception for the reasons stated by the judge.

[3] In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), we modify the judge's d remedy by requiring that backpay shall be paid with interest compounded on a daily basis. We shall also modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

[4] *Baptist Hospital of East Tennessee*, 351 NLRB 71 (2007) (hospital staffing for holiday shift; employer could "assign . . . employees . . . determine and change starting times, quitting times and shifts . . . [and] determine or change the methods and means by which its operations are to be carried on"); *Good Samaritan Hospital*, 335 NLRB 901 (2001) (hospital staffing matrix; employer could "decide the number of employees to be assigned to any shift or job . . . float employees from one working area to another working area, [and] determine appropriate staffing levels"); *Continental Telephone Co.*, 274 NLRB 1452 (1985) (attendance policy; employer could "formulate and change the working schedules" and "change the rules and regulations . . . governing the conduct of employees"); *Emery Industries*, 268 NLRB 824 (1984) (absentee policy; employer could discipline employees for "neglect of duty"); *Consolidated Foods Corp.*, 183 NLRB 832 (1970) (transfer of driving operation to different site; employer could "change, modify or cease its operation, processes, or production, in its discretion, and . . . be the sole judge of all factors involved including . . . the efficiency, usefulness and practicability of . . . processes . . . and personnel"); *Ador Corp.*, 150 NLRB 1658 (1965) (closing line of operations; employer could "abolish or change existing jobs, increase or decrease the number of jobs, change . . . processes, products, equipment and operations").

[5] This evidence demonstrates the error in our dissenting colleague's assertion that the Respondent's action was no more than a permissible layoff and reassignment of work within the terms of the contract.

[6] Only after the Union had filed unfair labor practice charges did the Respondent assert that the Union had acquiesced or waived its bargaining rights by its actions. Before that point the Respondent cited only the terms of the contract as its basis for refusing to bargain.

2009,[7] when the parties were bargaining for a new contract and the Respondent first indicated that it might terminate the cashiers, the Union immediately asserted its intent to demand bargaining over the prospective decision and its effects at the proper time. The Union gave no indication that it was retreating from this position the following day, when it assented to the Respondent's request to keep the matter confidential until the decision was finalized.

Moreover, none of the Union's actions at the next bargaining session on September 15 were inconsistent with its stated intent to demand decision bargaining. First and most important, the Union was not required to demand actual bargaining at any point before the Respondent confirmed that the decision would be implemented on a specific date. A union's responsibility to demand bargaining is not triggered when the employer indicates only "future plans about which the timing and circumstances are unclear."[8] As of September 15, the Respondent had not specified when its proposed action would be implemented.

Second, it was reasonable for the Union to request information concerning the prospective action and to discuss the prospective action's implementation at the September 15 bargaining session, even if it still intended to demand decision bargaining. Because the date of implementation was unknown to the Union before October 1, and the Respondent had not agreed to bargain over the decision, the Union needed as much information as it could obtain to prepare not only for decision bargaining but also for the clear possibility that the Respondent would act without bargaining.

Third, it was also reasonable for the Union to ask the Respondent to make an "official announcement" of its intent to the employees who would be affected before the upcoming contract ratification vote.[9] The employees had a clear interest in receiving advance notice of the Respondent's intent even if the Union intended to bargain over the decision, and the Union had a clear interest in having that notice provided so that employees would not believe the Union had withheld the information from them during the ratification vote.[10] As noted above, from August 26, when the Respondent first raised the possibility of eliminating the cashiers, until October 1, when the Respondent confirmed that it intended this to happen on December 4, the Union—at the Respondent's own request—kept that possibility confidential. Because the matter was not made public for a period of weeks at the behest of the Respondent, the Union's later request that the Respondent give the employees notice of its intention did not signal the Union's acquiescence or waiver of its right to bargain. Indeed, it would be entirely inequitable to treat the Union's compliance with the Respondent's own request for confidentiality as having given the Respondent a license to act unilaterally.[11]

For all of those reasons, we affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain over its decision to eliminate the retail cashier position and lay off all of its retail cashiers. In addition, we agree with the judge that the Respondent independently violated Section 8(a)(5) and (1) by eliminating that classification, which was embodied in the parties' collective-bargaining agreement, without the Union's consent. See *Mt. Sinai Hospital*, supra at 895 fn. 2.[12]

B. Effects Bargaining

The General Counsel has cross-excepted to the judge's dismissal of the complaint allegation that the Respondent unlawfully refused to bargain over the decision's effects. However, the effects were clearly bound up in the threshold dispute, and we have found that the Respondent is obligated to bargain over the decision itself. The effects may also be changed in the course of the Respondent's compliance with our remedial order to bargain. It would therefore be premature for us to reach the effects allegation at this time, and we deny the cross-exception for this reason.[13]

C. Unlawful Surveillance

We also agree with the judge that the Respondent violated Section 8(a)(1) several months after the elimination of the cashiers, when it photographed some of its employees while they were participating in an informational

[7] All subsequent dates are in 2009.

[8] *Pan American Grain Co.*, 343 NLRB 318, 338 (2004), enf. denied on other grounds 448 F.3d 465 (1st Cir. 2006); *Oklahoma Fixture Co.*, 314 NLRB 958, 960–961 (1994), enf. denied on other grounds 79 F.3d 1030 (10th Cir. 1996).

[9] The judge correctly rejected the Respondent's mischaracterization of the Union's request for preratification notice to the affected cashiers as having "asked the Respondent to proceed" with their elimination.

[10] An email from the Respondent's own chief negotiator to upper management concerning the Union's request acknowledged: "Remember we asked the Union to keep the info confidential which they have at this point but it would be difficult for them to continue to keep the confidentiality as they look for a vote on the new tentative agreement."

[11] Moreover, although the Union's request to bargain on October 13 did not follow immediately upon the Respondent's October 1 notice, the request was not untimely since the stated date of implementation was 2 months later.

[12] Having reached the above conclusions based on well established Board precedent, we find it unnecessary to comment on our colleague's endorsement of the "contract coverage" theory of waiver, which the Board rejected in *Provena St. Joseph Medical Center*, 350 NLRB 808, 811–815 (2007).

[13] However, we do not agree with the judge that the Union "never sought to bargain" about effects.

picket line on a public sidewalk outside one of its stores. There is no dispute that the Respondent videotaped and took pictures of the picket line and was seen doing so by those employees. The Respondent does not contend that any violence or invasion of its property occurred or was threatened, and it therefore had no legitimate interest in filming the picket line.[14]

ORDER

The Respondent, Embarq Corporation, a wholly-owned subsidiary of Centurytel, Inc., d/b/a Centurylink, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Photographing and videotaping employees engaged in protected concerted union activity.

(b) Failing and refusing to bargain with the Union regarding its decision to eliminate the unit classification of retail cashier and eliminating that classification without the consent of the Union.

(c) Refusing to provide the Union with requested relevant information relating to its decision to eliminate the job classification of retail cashier, or the effects of that decision.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, restore the classification of retail cashier and offer reinstatement to Jacqueline Brownlee, Kathryn Dawkins, Pamela DePalma, Thomas England, Debra Mercer, Peggy Mills, Rebecca Ribaudo, Joyce Smith, and Lynn Taylor.

(b) Make whole Jacqueline Brownlee, Kathryn Dawkins, Pamela DePalma, Thomas England, Debra Mercer, Peggy Mills, Rebecca Ribaudo, Joyce Smith, and Lynn Taylor plus interest as set forth in the remedy section of the decision.

(c) Provide the Union with all documents requested in its information request dated December 15, 2009.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in the Las Vegas, Nevada area copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 16, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HAYES, dissenting in part.

The parties' collective-bargaining agreement for a unit of the Respondent's clerical employees clearly and unmistakably recognizes the exclusive management right to classify, reassign, lay off, and discharge employees, and it provides for 2 weeks advance notice of any nonemergency layoffs. On December 4, 2009, the Respondent unilaterally laid off all nine employees in the bargaining unit classification of retail cashier, and it reassigned their work to employees in the unit classification of retail store consultant. Prior to doing so, the Respondent gave the requisite advance notice of layoffs to employees and the Union.

In other words, the Respondent did exactly what the parties' contract expressly permitted it to do. I reach this conclusion even under the Board's waiver standard, which requires that contractual language permitting uni-

[14] The General Counsel cross-excepts to the judge's failure to find that the Respondent's videotaping of the picket line, along with its photographing, was unlawful. Given the judge's fact findings, the General Counsel appears correct that this failure was inadvertent. We will modify the Order and notice accordingly.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

lateral changes in employees' terms and conditions of employment must be "clear and unmistakable."[1]

The judge and my colleagues disagree. In their view, the Union did not waive its right to bargain about the Respondent's decision because the management-rights provisions of the contract do not specifically permit a layoff and reassignment of work that affects all employees in a particular bargaining unit classification. In my view, their contractual interpretation cannot be reconciled with the clear and express terms of the contract. I would reverse the judge and dismiss the complaint allegation of an unlawful refusal to bargain about the layoff decision.[2]

Inasmuch as I would find the Respondent's conduct lawful under the waiver analysis, it should be unnecessary here to address the Respondent's argument that the appropriate standard for determining whether there was a decisional bargaining violation in this case should be the "contract coverage" standard adopted by the United States Courts of Appeals for the District of Columbia, First, and Seventh Circuits,[3] and endorsed by several dissenting Board members,[4] rather than the Board's "clear and unmistakable waiver" standard. However, I take this opportunity to endorse the "contract coverage" standard and to express my view that the result reached by the majority here is a prime example of the flaws inherent in the "clear and unmistakable" standard.

Waiver should not be an issue here. The parties have bargained about the mandatory subjects of classification, reassignment, lay off, and discharge, and they have included specific language referencing those actions in their contract. The Union has exercised its statutory right to bargain about such matters. Should issues arise mid-contract concerning the application of bargained-for terms in particular factual settings, those issues are grist for an arbitrator's mill, or the parties can litigate the matter in court. The Board has no special expertise and is entitled to no deference in the interpretation of collective-bargaining agreements.

My colleagues' waiver approach—which admittedly is the approach taken by the Board for many years now—so narrowly and strictly defines the coverage of a contract term as to require that it specifically address a particular factual scenario. As the D.C. Circuit has observed, the problem with this approach is that it imposes the impossible task of requiring parties to bargain with specificity about the unforeseen.[5] Accordingly, a negotiated contract provision becomes merely a starting point for continuing negotiations during the term of a contract about the application of the provision. Rather than protecting statutory bargaining rights, this outcome is contrary to the statutory policy underlying the enactment of Section 8(d), intended to give finality to collective-bargaining agreements.

In short, applying extant waiver law, I would dismiss the complaint allegations relating to the layoffs of retail cashiers and reassignment of their work to other unit employees. However, I add my voice to those who advocate changing extant law by adopting the "contract coverage" standard for analyzing allegations of this type. Doing so would appropriately limit the Board's role in contract interpretation and better serve statutory policy.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT photograph or videotape employees who are in engaging in protected concerted union activity without proper justification.

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[1] See *Provena Hospitals*, 350 NLRB 808 (2007), and cases cited there.

[2] I would also dismiss the corollary effects bargaining and information request allegations in the complaint. I find no need to pass on whether, apart from the contract language, the Union's statements and conduct during negotiations for the agreement that went into effect on October 26, 2009, are an independent basis for finding waiver of the right to bargain about the layoffs.

I note that I join my colleagues in finding that the Respondent's photographing and videotaping of picketing former employees was unlawful.

[3] *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992); *Dept. of the Navy v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992); *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993); *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14, 25 (1st Cir. 2007).

[4] *Provena Hospitals*, supra at 816–818 (Battista, dissenting); *California Offset Printers*, 349 NLRB 732, 737 (2007) (Schaumber, dissenting); *Dorsey Trailers, Inc.*, 327 NLRB 835, 836–837 (1999) (Hurtgen, dissenting); *Exxon Research & Engineering Co.*, 317 NLRB 675, 676–677 (1995) (Cohen, dissenting).

[5] "[I]t is naive to assume that bargaining parties anticipate every hypothetical grievance and purport to address it in their contract. Rather, a collective bargaining agreement establishes principles to govern a myriad of fact patterns." *NLRB v. Postal Service*, supra at 838.

WE WILL NOT fail and refuse to bargain with International Brotherhood of Electrical Workers Local Union #396, AFL–CIO, the Union, regarding any decision to eliminate a unit classification and WE WILL NOT eliminate a unit classification without the consent of the Union.

WE WILL NOT refuse to provide the Union with requested relevant information relating to our decision to eliminate the job classification of retail cashier, or the effects of that decision.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days of the Board's order, restore the classification of retail cashier and offer reinstatement to Jacqueline Brownlee, Kathryn Dawkins, Pamela DePalma, Thomas England, Debra Mercer, Peggy Mills, Rebecca Ribaudo, Joyce Smith, and Lynn Taylor.

WE WILL make whole Jacqueline Brownlee, Kathryn Dawkins, Pamela DePalma, Thomas England, Debra Mercer, Peggy Mills, Rebecca Ribaudo, Joyce Smith, and Lynn Taylor, plus interest as set forth in the remedy section of the Board's decision.

WE WILL provide the Union with all documents requested in its information request dated December 15, 2009.

EMBARQ CORPORATION, A WHOLLY-OWNED SUBSIDIARY OF CENTURYTEL, INC., D/B/A CENTURYLINK

Darlene Haas Awada, Esq., for the General Counsel.
James T. Winkler, Esq., for the Respondent.
Jesse Newman, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Las Vegas, Nevada, on June 29 and 30, 2010, pursuant to an amended consolidated complaint that issued on January 27, 2010.[1] The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by photographing and videotaping employees who were picketing, violated Section 8(a)(5) of the Act by failing to provide the Union with requested relevant information, and violated Section 8(a)(5) of the Act by laying off its retail cashier employees. The Respondent's answer denies any violation of the Act. I find that the Respondent violated the Act substantially as alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Embarq Corporation, a wholly-owned subsidiary of Centurytel, Inc., d/b/a Centurylink, hereinafter called the Company, is a Delaware corporation with offices in Las Vegas, Nevada, engaged in the business of furnishing telephone and other communication services. The Respondent annually derives gross revenues in excess of $100,000 and performs services valued in excess of $50,000 in States other than the State of Nevada. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that International Brotherhood of Electrical Workers Local Union #396, AFL–CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Embarq or its predecessors initially provided land line telephone service in multiple states including the Las Vegas, Nevada, metropolitan area. At one point Embarq was a subsidiary of Sprint, at which time it also offered cellular telephone service. Sprint divested itself of Embarq, and Embarq was acquired by, and is now a subsidiary of, Centurytel, which markets its services as Centurylink. The Company no longer provides cellular telephone service, but does provide high speed internet and, through another company, satellite television.

The Union was certified as the clerical employees' collective-bargaining representative on November 2, 1954, and has, since that date, been recognized as the exclusive collective-bargaining representative of unit employees by the Company or its various predecessors. In the Las Vegas area there are two units, a plant unit and a clerical unit. The Section 8(a)(1) allegation regarding photographing and videotaping of employees who were picketing relates to the plant unit. The Section 8(a)(5) allegations herein arise from the Company's elimination of the position of retail cashier in the clerical unit and refusal to provide requested information with regard to the elimination of those positions.

There is no dispute regarding the facts relating to the picketing and there are only minor disputes regarding the facts related to the layoffs. I shall first deal with the Section 8(a)(1) allegation relating to picketing and then address the central issue in this case, the layoffs.

B. The Section 8(a)(1) Allegation

On April 22, 2010, over 100 members of various local unions, including members of Local 396 who were employed by the Company, picketed the Company's retail store located in Henderson, Nevada, a suburb of Las Vegas. The Union announced the informational picketing, which was to protest "difficult bargaining with the Company, and . . . problems with . . . grievances," to its members at meetings and by email. Law

[1] All dates are in 2009, unless otherwise indicated. The charge in Case 28–CA–022804 was filed on December 7, the charge in Case 28–CA–022849 was filed on January 4, 2010, and the charge in Case 28–CA–023021 was filed on April 29, 2010.

enforcement authorities were notified in advance of the picketing, and the Company learned that it was to occur.

The Respondent stipulated that, for purposes of this proceeding, Shauna Slayback was an agent of the Respondent and "that she took the photographs" of the picketing. Photographs and a videotape produced pursuant to subpoena reveal that photographs and videotape taken of the picketing by the Company included employees of the Respondent. Anthony Gates, area manager customer service for the Company, also photographed the picketing, but the record does not establish that any photograph of a company employee was taken by Gates rather than Slayback. The Union also took photographs of the picketing event. Jesse Newman, senior assistant business manager of the Union, testified that the Union received "calls from employees that were concerned about retaliation because of the filming" conducted by the Company. The Union, therefore, on its website, posted a photograph in which only one individual was identifiable, Jessica Toroczy, who was employed by the Union as a secretary.

The picketing took place on a public sidewalk adjacent to the parking lot of the retail store. There is no contention or evidence of trespass, misconduct, or blocking of entry.

The Respondent argues that, insofar as news media had been informed of the event, "every participant in the event could reasonably anticipate that he or she could end up on the 10:00 news." Strikes and informational picketing are public events that often result in coverage by news media. Whether the news media were notified of the event by the Union is immaterial. Employee expectations are not the criteria upon which a violation of the Act is predicated. Board precedent is clear that "absent proper justification the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate." *Mercy General Hospital*, 334 NLRB 100, 105 (2001), citing *F. W. Woolworth Co.*, 310 NLRB 1197 (1993). The determination of the Union not to publish photographs that it had taken of the picketing in which individual employees were identifiable because of concerns of retaliation expressed to Business Agent Newman confirm the validity of Board precedent.

The Respondent, by photographing employees engaged in protected concerted union activity violated Section 8(a)(1) of the Act.

C. The 8(a)(5) Allegations

1. Facts

a. Retail store operations

The Company provides land line telephone service with various options such as call waiting and caller identification, high speed internet, and, through another company, satellite television service. Customers pay for their services in various ways including coming to one of the seven retail stores located in the Las Vegas metropolitan area. The two clerical unit classifications relevant to this proceeding are the classification of retail cashier and retail sales consultant. Until December, employees in the classification of retail cashier were employed at the three busiest Las Vegas area retail stores, Civic Center, Meadows, and Renaissance.

Retail cashiers, whom retail sales consultant Kathlene Selcke referred to as tellers, received payments by check, money order, cash, and credit card. Retail cashier Kathryn Dawkins explained that, if a customer had neglected to bring his or her current bill, the retail cashier would look up the account and inform the customer how much was owed. Retail cashiers would also seek to have customers avail themselves of other services offered by the Company and would refer them to a retail sales consultant if the customer expressed interest in any other services. If retail cashiers became excessively busy, retail sales consultants or the store manager would assist in receiving customer payments.

At some point prior to 2004, when Embarq was a subsidiary of Sprint, the record does not establish the exact date, automatic payment machines were installed at the retail stores. Those machines received payments by cash, check, or credit card, but not money orders. They did not make change, thus any overpayment was posted as a credit. They also were unable to answer questions regarding an account.

Retail cashiers, in a manner similar to how bank tellers work, received money and made change. Retail sales consultant Selcke testified that, at the Renaissance store at which she worked, the cash tills used by the retail cashiers contained $100, whereas, until the position of retail cashier was eliminated, the tills of the retail sales consultants who received payments when necessary, contained only $50. When the retail cashier position was eliminated, the amount in the tills of the retail sales consultants was increased to $100. Selcke testified that, each day, a deposit slip was collected from each automatic payment machine. Retail cashier Kathryn Dawkins testified without contradiction that retail cashiers, and presumably retail sales consultants who had received payments, balanced their cash registers at the end of each day.

The chief responsibility of retail sales consultants, who are sometimes referred to in the record as customer service consultants, was to sell additional services to existing customers or new customers who entered the store. They were "assigned a monthly quota for the purpose of commission." In the four stores at which no cashiers were employed, retail sales consultants would also receive payments. In the three stores that employed retail cashiers, they would receive payments only when necessary to assure that the customers received prompt attention.

b. The collective-bargaining agreement

The collective-bargaining agreement covering the clerical unit is effective by its terms from April 1, 2009, through March 31, 2012.[2] The contract was ratified by the union membership on October 26, 2009. The clerical contract recognizes the Un-

[2] The parties have been operating under the current agreement since October 26 when the union membership ratified the agreement. Senior Assistant Business Agent Jesse Newman testified that there was no issue relating to contractual language, but that the agreement has not been signed only because of "an issue on the pension bands." That issue was not fully explained on the record and is immaterial to this decision insofar as the Union and the Company agree that they are, and have been, operating under the current unsigned agreement.

ion as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> The Company's Clerical employees in the various departments as defined by the Act, as to the extent certified by the National Labor Relations Board on November 2, 1954, in Case No. 20–RC–2644.

Wage schedules set out the wages for the classifications of retail cashier and retail sales consultant.

The management-rights clause of the contract, article 2, 2.02 provides, in pertinent part:

> The Company has and will retain the exclusive right and power to manage its business and direct working forces, including but not limited to, the right to hire, classify, grade, suspend, reassign, lay-off, discharge, promote, demote, or transfer its employees, provided that the Company shall not exercise these rights in violation of the provisions of this agreement.

Article 8 (Reduction in Force), paragraph 8.01 provides, in pertinent part:

> In the event of any reduction of the working forces, the Company agrees to notify the individual employees to be laid off not less than two (2) weeks prior to the lay-off and simultaneously to inform the Union of the names and occupations of the employees to be laid off. . . .

Paragraph 8.02 of the contract provides: "Lay-offs due to lack of work shall be made in the inverse order of seniority . . . ."

During negotiations in 2004 for the clerical collective-bargaining agreement, the Company proposed language that the Company, "in its discretion," whenever it "deems that it is advisable to reduce the work force, reduce the hours being worked by employees, or to lay-off employees," could do so and, when doing so, designate 25 percent of the employees in the affected classifications who "in the Company's judgment" were the "best qualified and best performing employees," to be the last to be laid off or have their hours reduced.

International Representative Gina Cooper, who at the time was assistant business manager of the Union, wrote "bullshit" next to the proposed language and, in negotiations, rejected the proposed language. The Company thereafter withdrew the proposal. The current language has remained virtually unchanged in the last three collective-bargaining agreements.

c. Elimination of the retail cashier position

Centurylink was created as a result of the merger of Embarq and Centurytel in late June or early July 2009. In July 2009, Jeff Oberschlep, who had previously been employed by Centurytel in Dallas, Texas, became the vice president and general manager of Centurylink in Nevada. Shortly after assuming that position, he requested Anthony Gates, area manager customer service, who oversees the operations of the retail stores, "to see if there was a way that we could become more efficient" consistent with management's goal of reducing "the overall expense structure." Gates provided various recommendations including creating a mobile store, putting managers over multiple stores, and eliminating the retail cashier position. The Company maintains data that reflects the number of visitors to each retail store on a monthly basis and the revenue collected at each store. The revenue report does not distinguish between revenue received by retail cashiers and retail sales consultants and revenue paid into the automatic payment machines. Oberschlep, when questioned as to whether he reviewed the actual documents reflecting the number of visitors and revenue collected acknowledged that he did not specifically recall. It is undisputed that, over the past 2 years, the number of visitors to each retail store and the revenue collected at those stores decreased.

The Union and the Company were still in negotiations regarding what is now the current collective-bargaining agreement in August. Oberschlep was aware of those negotiations and, on August 25, he informed Employee Relations Manager Joseph Basile, who was the spokesperson for the Company in negotiations, that the Company was "looking at moving toward eliminating the [retail] cashiers' position." Notwithstanding the "looking at" communication to Basile, Oberschlep admitted, "I had made the decision that I was going to eliminate the positions." No document setting out the decision was created.

Consistent with what Oberschlep had told him, Basile, at a contract bargaining session of August 26, informed the Union that "he had just been informed that the Company was moving in the direction of eliminating the retail cashier positions" that he "didn't have a timetable yet," but would get more information.

Senior Assistant Business Manager of the Union Jesse Newman, spokesperson for the Union, recalled that Basile mentioned "a possible change with the retail cashiers," involving the "possibility of" a layoff but that he did know if or when it was going to happen." Newman commented that "this was not the appropriate time to be discussing" that matter, that since Basile "didn't have the appropriate information . . . that it would be more appropriate at a different time," and that the Union would be requesting to bargain the decision and effects of whatever change was contemplated.

Charles Randall, business manager and financial secretary of the Union, took notes of the meeting. He had no independent recollection of the foregoing conversation, but his notes reflect that Basile informed the Union that the Company "may be looking at doing something with the cashier classification." Basile had no particulars "on how it would roll out, and that it was only a local issue." Randall's notes reflect that Newman stated that, when Basile knew more, "would be the appropriate time to discuss it" and that the Union would be "requesting to barg[ain] the decision and effects of any changes." Neither Newman nor Randall dispute Basile's recollection that, on the following day, he asked them to keep the matter confidential and that "they were fine with that."

Notes of the bargaining session taken by Christy Gray, the Company's western region human resources business partner, reflect that, when Basile mentioned the possible elimination of the retail cashier position, he stated that it was "not 100 percent decided."

Following the bargaining session Basile sent an email dated August 26 to multiple recipients including Oberschlep and Joseph Osa, the person to whom Basile reports, in which he

summarized the contract bargaining. The email notes that he informed the Union "of our intent to eliminate the remaining Retail Cashier positions" and that, "once we make this official" he, Basile, would "follow the contractual guidelines by giving formal notification." The email notes that Jesse Newman stated that "he would require 'bargaining over the decision and effects.' (sound familiar??)."

The testimony of Basile and Newman and the notes of Christy Gray confirm that the Union was not informed of the Company's "intent to eliminate" the retail cashier position. Rather, the Union was informed that the Company was "moving in the direction of eliminating" the position but that it was "not 100 percent decided." The email confirms that Newman sought to find out when any contemplated change would occur and stated the intent of the Union to bargain the decision and effects.

Area Manager Gates prepared a powerpoint presentation dated September 11 that sets out various strategies for increasing "consumer penetration" and improving "financial performance." The section on retail optimization refers to consolidating store management and eliminating retail cashiers, and that the latter action would result in a saving of $349,147, 74 percent of which were direct labor costs. Vice President Oberschlep acknowledged that cost reduction was a driving factor in his decision to eliminate the retail cashier position.

On September 15, the Union and the Company agreed upon the terms of the contract. When they initially testified neither Business Manager Newman nor Business Manager Randall recalled that retail cashiers were mentioned at that bargaining session. Following testimony by Christy Gray, whose notes did reflect discussion, Randall located the notes of the meeting that he had taken. His notes confirm that there was discussion of the seniority of the nine retail cashiers and their rights under the contract. Newman questioned whether the work would remain. Basile responded that the work would remain, that payments would be received by the automatic payment machines or retail sales consultants, noting that their receipt of payments would give them the opportunity to make a sale. Newman questioned whether retail cashiers existed at other locations. Anthony Gates stated that he believed retail cashiers existed in North Carolina and "possibly other places," but that the elimination related only to Nevada.

Basile recalled that, on September 15, he informed the Union that "we were going to eliminate the positions," that the only issue "was when we were going to do it." The notes made by Randall reflect that, following the discussion of seniority and the contractual rights of the employees, Basile stated that the Company did not know when anything would happen and again requested that the Union keep the matter confidential. Gray's notes reflect that, although Basile did not give a specific date upon which the positions would be eliminated, he mentioned "the end of November." I find that Gray's notes more accurately reflect what was said in view of a subsequent conversation in which Newman made a request of Basile.

Basile's uncontradicted testimony establishes that, following the foregoing conversation, Newman stated that the Company had put the Union "in a bit of an awkward position since they [the Union] knew about the information . . . [but had been asked] to keep it confidential." Newman asked if the Company could make its official announcement to the affected employees prior to the ratification vote on the contract. Basile agreed that "it would have put the Union . . . in an awkward position if we had just agreed to the contract and then . . . notified the retail cashiers that they were going to be laid off." He brought the Union's concern to the attention of higher management who agreed to make the announcement several weeks prior to the effective date of the layoff rather than the contractually required 2 week notification period.

On October 1, Basile sent an email to Randall attaching a letter formally notifying the Union of the layoff of all retail cashiers. The letter, in pertinent part, states:

> I regret to inform you that Friday, October 2, 2009, the Retail Cashiers will be notified of a reduction in force, which will impact their entire work group. The layoff is a result to technological improvements and competitive pressure in our industry combined with access line losses in our markets. . . . [T]he last day of work for the employees will be December 4, 2009.

As already noted, the automatic payment machines had been in use for over 5 years. The Company introduced no evidence of any other new technology relating to payment of bills.

By email on October 13, Newman forwarded to Basile a letter misdated October 15 that states, in pertinent part:

> This letter is in response to your . . . letter wherein you notified the Union of the Company's intent to layoff the entire Retail Cashier work group as a result of technological improvement, competitive pressure and access lines lost in the market. Therefore, consider this notice of the Union's intent to bargain both the decision and the effects regarding the lay offs of the Retail Cashier work group.

On November 3, Newman, on behalf of the Union, requested information "necessary and relevant . . . to effectively bargain the decision and effects regarding the Retail Cashier reduction of forces." The request sought:

> 1. A [c]opy of any and all contemporaneous notes, reports, power point presentations, recordings or otherwise regarding any discussion to lay off the Retail Cashier classification.
>
> 2. A [c]opy of any and all information, notes, reports, meeting minutes or any thing else the Company used to make the determination lay off the Retail Cashier classification.
>
> 3. A [c]opy of the names and title of all Company representatives who attend[ed] any and or all meetings where any discussions were held regarding the Retail Cashier classification lay off.
>
> 4. A copy of the current job description for the Retail Cashier classification detailing any and all work tasks they perform.
>
> 5. A copy of the current job description for the Retail Sales Consultant classification detailing any and all work tasks they perform.
>
> 6. A copy of the new procedure or guidelines that will be used by the Retail Sales Consultants detailing how to handle any form of bill payments. . . .

7. A copy of any and all job openings/bids within the Company locally and for all other Century Link locations.

8. A copy of any and all documents showing the number of access lines lost by the Company and its predecessors broken down yearly for the last three (3) years.

9. A copy of any and all documents showing the number of new access lines gained by the Company and its predecessors broken down yearly for the last three (3) years.

10. A copy of any and all documents shown the number of access lines lost by the Company and its predecessors which were won back broken down yearly for the last three (3) years.

11. A copy of any and all communications sent out to customers or posted in the Retail Stores explaining the changes and new requirements regarding bill payments being made within the Retail Stores.

On November 16, Basile wrote Randall citing the management-rights clause of the contract and stating that he does not believe that the Company "has an obligation to bargain over the decision." Consistent with that position he requests that the Union identify the information it "needs for effects bargaining."

On November 25, following a telephone conversation between Basile and Randall on November 18, Basile wrote the Union stating that, "[i]n the Company's view, Items 1, 2, 3, 8, 9, and 10 appear relevant only to 'decision' issues" and the Company "does not believe it is required to provide the Union with information related to the decision, and is herby declining to do so." The Company provided the job descriptions sought in items 4 and 5. Regarding items 6 and 11, Basile stated that there were no such documents. He referred the Union to the Company's internal website for the job postings sought in item 7.

Randall responded in a letter also dated November 25 in which he reiterated the Union's position that the Company was obligated to bargain regarding the decision relating to the "complete elimination of all employees working as retail cashiers" and that the information sought was relevant both as to the decision as well as permitting the Union "to make a good faith determination of your assessment that it was not an a mandatory subject" of bargaining.

Contemporaneously with the foregoing communications, the parties were proposing dates to meet with a representative of the Federal Mediation and Conciliation Service. Randall's letter confirmed that the parties would meet on December 16 and that the Union needed the information sought in order to prepare for negotiations regarding the "decision and effects."

A letter from Basile to Randall dated December 8 refers to meeting to bargain effects. That letter states that the Company has no notes, reports, powerpoint presentations, or recordings responsive the Union's request of November 3. It provides figures, but not documents, reflecting access lines lost yearly from January 2006 through October 2009.

Business Manager Randall, on December 15, wrote Basile, referencing the Union's prior request, and modifying the request in certain respects. The letter, in pertinent part, states:

In regards to items number one, two and three of he union's initial request your answer was non-responsive to the requested information. Therefore, please provide any and all information including, but not limited to, reports, notes, surveys, outside studies, customer complaints, sales volume per store, employee evaluations, job studies or anything else [upon which] the Company based its decision to lay off the Retail Cashier Classification.

In regards to item number eight, please provide a copy of any and all information showing the total number of lines lost in the greater Las Vegas Valley broken down yearly for the last three (3) years by land line residential, land line business, high speed internet and video.

In regards to items number nine and ten please prove a copy of any and all information showing the total number of new lines installed in the greater Las Vegas Valley broken down yearly for the last three (3) years by land line residential, land line business, high speed internet and video.

In regards to item number eleven please provide a copy of any and all information showing the Company's policy on how customers will go about paying their bills inside a retail location once the Retail Cashier classification is eliminated, both over the counter payments and kiosk payments.

Also please provide a copy showing the total number of bill payments made at the retail locations in the greater Las Vegas Valley broken down yearly for the last three (3) years.

The meeting with the federal mediator on December 16 was short. Basile participated by telephone and, at the hearing herein, had no recollection of any matter of substance. Newman recalled that the meeting lasted less than an hour, that the Company continued to refuse to bargain regarding the decision and was unwilling to offer the retail clerks, who had been laid off on December 4, anything other than what the contract provided.

On January 19, 2010, Basile wrote Randall with regard to his information request of December 15, stating that he "cannot see how anything you are now asking for . . . is, or could be, relevant to bargaining over the effect on employees of the cashier layoffs.

Newman, in testimony, explained that the Union sought the information set out in the first three paragraphs of the November 3 request, which was modified by the first request in the letter of December 15, in order to determine the reasons for the decision and whether the Union could offer anything that could "save the jobs" of the cashiers.

Notwithstanding the existence of the powerpoint presentation dated September 11 that, inter alia, sets out the labor cost savings resulting from elimination of the retail cashiers, Basile's letter of December 8 represents that there were no such documents. When questioned in that regard, Basile answered that, if the people he goes to "tell me they don't have any [responsive documents], that's how I respond."

Although Vice President Oberschlep claimed that he did not believe that any documents existed that reflected the amount of money collected by cashiers as opposed to automatic payment machines, I question that claim. Retail cashiers and retail sales consultants had tills from which they made change as necessary

and were, as stated in the job description for the position and explained by retail cashier Kathryn Dawkins, required to balance their cash registers at the end of each day. The testimony of retail sales consultant Kathlene Selcke establishes that a deposit slip was collected from each automatic payment machine each day.

When questioned whether any consideration was given to laying off the most junior people in any classification other than the retail cashiers, Oberschlep answered, "Didn't look at that as a consideration."

2. Analysis and concluding findings

a. Elimination of the retail cashier position

The complaint alleges that the Respondent, on December 4, laid off its retail cashier employees, that the layoff was a mandatory subject of bargaining, that the Respondent laid off the employees without affording the Union an opportunity to bargain about the decision or its effects and without the consent of the Union.

The elimination of the retail cashier classification did not constitute an entrepreneurial decision relating to the "scope and direction of the enterprise." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981). It was a staffing decision. The September 11 powerpoint document reflects the savings resulting from a reduction in force of all 9 cashiers. Customers continued to pay their bills to employees of the Respondent at retail stores. The work previously performed by retail cashiers continues to be performed, albeit by retail sales consultants. A decision to "combine jobs, to reassign work, and to lay off employees" constitutes a mandatory subject of bargaining. *Holmes & Narver*, 309 NLRB 146 (1992). "[W]hen virtually the only circumstance the employer has changed is the identity of the employees doing the work . . . the decision did not involve a change in the scope and direction of the enterprise that is exempt from the statutory bargaining obligation." *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021, 1023 (1994).

Counsel for the General Counsel points out that this was not a "run-of-the mill" layoff. I agree. Although the Respondent couched its action as a layoff, the elimination of the position of retail cashier resulted in the termination of all retail cashiers. Retail sales consultants assumed the work of the retail cashiers. The Respondent's unilateral determination to eliminate the job classification of retail cashier is confirmed by the September 11 powerpoint document, which states on the fifth page: "Reduce headcount by eliminating the 'cashier' position."

The Union, by its email on October 13 that forwarded the letter misdated October 15, requested that the Respondent bargain both the decision and effects of the layoff of the retail cashiers. On November 3, the Union followed up by requesting information. On November 16, the Respondent informed the Union that it did not believe it had an obligation to bargain, a position it has continued to maintain.

The Respondent, citing the management-rights clause of the contract, contends that the Union waived its right to bargain regarding the layoffs. In 2004, the Union specifically rejected proposed language giving the Respondent the right to lay off when it "deems that it is advisable" to do so. The waiver argument might have arguable merit if the Respondent had determined the number of employees whose services it did not need due to diminished traffic and revenue and, consistent with the "lack of work" provision in paragraph 8.02 of article 8 of the contract, laid off in inverse order of seniority. Layoffs pursuant to the unilateral elimination of a contractual job classification are not privileged under any reading of the contract.

Insofar as fewer customer visits to retail stores suggested a need for fewer employees, there would have been a concomitant reduction in the number of retail sales consultants absent the transfer of the work of retail cashiers to retail sales consultants. The August 26 email from Basile to his superiors states that he informed the Union of the Respondent's intent to "eliminate the remaining Retail Cashier positions." Although that is not what Basile stated to the Union, his report confirms that the action of the Respondent was elimination of a classification, not a reduction in force carried out consistently with the contractual requirement of layoff by seniority. Oberschlep admitted that he gave no consideration to laying off junior employees in any classification other than retail cashier, stating, "Didn't look at that as a consideration."

As explained in *Holy Cross Hospital*, 319 NLRB 1361 (1995), "once a specific job has been included within the scope of the unit by either Board action or the consent of the parties, the employer cannot remove the position without first securing the consent of the union or the Board. *Hill-Rom Co.*, 957 F.2d 454, 457 (7th Cir. 1992)." Id. at fn. 2. No collective-bargaining agreement provision gave the Respondent the right to unilaterally eliminate a unit classification.

The Union did not waive its right to bargain. The classification of retail cashier was set out in the contract with specified wage rates. That contractual provision became a nullity when the Respondent eliminated the position. The decision to eliminate the retail cashier position was a mandatory subject of bargaining insofar it directly affected the wages, hours, and working conditions of the retail cashiers, all of whom were terminated when the position was eliminated.

Consistent with its desire to reduce "headcount," the Respondent could have approached the Union and proposed elimination of the retail cashier position. If the Union did not agree to do so, the Respondent was required by the contract to lay off by inverse seniority which, in the absence of reassignment of the job duties of retail cashiers, would have assured that a number of retail cashiers remained employed. The Respondent was not privileged to eliminate a contractually established position without the consent of the Union.

The Union did not waive its right to bargain regarding the Respondent's action. The right to eliminate a job classification is not "enumerated as one of the rights of management" in the management-rights clause. See *Miami Systems Corp.*, 320 NLRB 71, 74 (1995). The elimination of the bargaining unit classification of retail cashier required that the Respondent not only bargain with the Union regarding its decision but also obtain the consent of the Union before implementing its decision. Implementation of the Respondent's decision directly affected the wages, hours, and working conditions of the retail cashiers, all of whom were terminated.

The Respondent argues that the action of the Union in seeking an early announcement of its decision constituted a waiver

of its right to bargain. I disagree. Until October 1, nothing was definite. As the brief of the General Counsel points out, citing *Sierra International Truck, Inc.*, 319 NLRB 948, 950 (1995), an "'inchoate and imprecise' announcement of future plans" is insufficient to trigger an obligation to request bargaining or risk waiving the right to bargain. On August 26, nothing was 100 percent certain. Basile's email of August 26 summarizing the bargaining session confirms that formal notification of the Union would occur "once we make this official." The Union, on August 26, told the Respondent that it would seek to bargain regarding the decision and effects. As of September 16, the date for the proposed action was uncertain, and the Union had been requested to keep the matter confidential. The Union, not wanting to violate the request for confidentially, requested the Respondent to notify the affected employees prior to the ratification vote. The Union was unaware that its request had been granted and a date for elimination of the position had been set until it received the email and attached letter on October 1 stating that the affected employees would be notified the next day and would be laid off on December 4. On October 13, less than 2 weeks after receiving that notification and almost 2 months prior to the proposed action, the Union, consistent with the position it had taken on August 26, requested to bargain over the decision and effects.

The Respondent cites no precedent, and I am aware of no precedent, holding that cooperation regarding procedural matters constitutes waiver of substantive and statutory rights. I concur with the observation in *St. Vincent Hospital*, 320 NLRB 42, 50 (1995), that it "would be utterly unfair were the law to permit party to an agreement to seek the help of the other party . . . [and then] hold the cooperation against it. . . ." The Union agreed to keep what the Respondent was "looking at, "confidential. When informed on September 16 that the Respondent would eliminate the retail cashier position but that the date had not been firmly decided, the Union realized the potential fallout of conducting a ratification vote without disclosing the intention of the Respondent to eliminate retail cashiers. The request for disclosure constituted neither acquiescence in the elimination of the position nor waiver of the Union's announced intention to request bargaining over the decision once it ceased to be confidential. The Union requested announcement to the affected employees prior to the ratification vote. The Union, less than 2 weeks after that announcement and almost 2 months prior to the date of implementation, requested bargaining. If Respondent had not refused to bargain, there would have been ample time to address the issues. The Union did not waive its right to bargain over the decision to eliminate the position of retail cashier. The Union did not consent to the elimination of this classification, the wage rates of which are set out in the collective-bargaining agreement.

The Respondent, by refusing to bargain with the Union regarding its decision to eliminate the contractual classification of retail cashier and by eliminating that position without the consent of the Union, violated Section 8(a)(5) of the Act.

Evidence at the hearing establishes that elimination of the retail cashiers affected the working conditions of retail sales consultants who are assigned monthly quotas but who, in the absence of retail cashiers, had to spend time receiving payments. The Union, consistent with its contention that the Respondent was obligated to bargain over the decision that eliminated the retail cashiers, never sought to bargain any effects upon retail sales consultants. As reflected in the communications between the Respondent and the Union, the Respondent never refused to bargain regarding any effects of its unlawful action. I shall, therefore, recommend dismissal of that aspect of the complaint.

b. Refusal to provide information

The complaint alleges the failure and refusal of the Respondent to provide the Union with the information sought in its letter of December 15, which modified the Union's initial request of November 3. Recent Board precedent, including *Postal Service*, 337 NLRB 820, 822 (2002), reaffirms longstanding precedent establishing that an employer is obligated to provide requested information so long as there is a "probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative." *Bohemia, Inc.*, 272 NLRB 1128 (1984).

I have found that the Respondent was obligated to bargain with the Union and to obtain the consent of the Union regarding its decision to eliminate the unit classification of retail cashier. Thus the claim that the information sought was not relevant because the Respondent had no obligation to bargain over the decision, only the effects, has no merit.

The Union's first request in its letter of December 15 was for "information including, but not limited to, reports, notes, surveys, outside studies, customer complaints, sales volume per store, employee evaluations, job studies or *anything else* the Company based its decision to lay off the Retail Cashier Classification." [Emphasis added.] As Newman explained in his testimony, the Union needed to know the basis for the decision so that it could determine whether the Union could offer anything that could "save the jobs" of the cashiers. The September 11 powerpoint presentation, placed into evidence by the Respondent, constitutes a document upon which the Respondent based its decision. Financial information was redacted from the document placed in evidence. The unredacted document as well as any other information that has come to the attention of the Respondent in the course of this proceeding is clearly relevant and must be produced to the Union. The information remains relevant, notwithstanding my findings herein regarding the unlawfulness of the elimination of the retail cashier position, insofar as compliance with my decision may have an impact upon future decisions of the Respondent relative to the utilization of personnel.

The second and third requests relate to lost lines, one of the factors stated by the Respondent for its action, and new lines. Although Basile, in his letter of December 8, provided the Union with numbers of lost lines, he did not provide the documentation relating to those losses or new lines installed. The annual figures provided, January 2005 through October 2009, reflect a loss of 4,385,870 access lines, well more than double the population of the Las Vegas metropolitan area. Documents establishing the net line loss or gain is relevant.

The fourth request relates to any information relating to any policy on how customers are to pay their bill inside a retail

location. Basile's letter of November 25, in response to item 6 in the Union's request of November 3, stated that there were no documents. Whether any such documents were created after the layoff occurred on December 4 is not established. The information sought is relevant.

The fifth request was for information showing the total number of bill payments made at the retail locations in the greater Las Vegas Valley broken down yearly for the last three (3) years. Insofar as retail cashiers balance their cash drawers and records are obviously kept showing who paid their bill, it would appear that the number of payments made, whether to a person or machine, is a number that should be able to be obtained. This information is relevant.

The Respondent, by failing and refusing to provide the Union with requested relevant information, violated Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. By photographing employees engaged in protected concerted union activity, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By failing and refusing to bargain with the Union regarding its decision to eliminate the unit classification of retail cashier and by eliminating that classification without the consent of the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

3. By refusing to provide the Union with requested relevant information relating to its decision to eliminate the job classification of retail cashier, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having eliminated the unit classification of retail cashier without bargaining with the Union and without the consent of the Union, it must restore that classification and offer reinstatement to Jacqueline Brownlee, Kathryn Dawkins, Pamela DePalma, Thomas England, Debra Mercer, Peggy Mills, Rebecca Ribaudo, Joyce Smith, and Lynn Taylor and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from December 4, 2009, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent must provide the Union with all documents requested in its information request dated December 15, 2009.

In view of the Board's decision in *Glen Rock Ham*, 352 NLRB 516 at fn. 1 (2008), I need not address the request of the General Counsel regarding compound interest.

The Respondent must also post an appropriate notice.

[Recommended Order omitted from publication.]